



PROTECTION OF INTELLECTUAL PROPERTY RIGHTS OF GENETIC RESOURCES OF BIODIVERSITY vis-à-vis FARMERS RIGHTS IN INDIA

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INTRODUCTION:

The knowledge system and the human intellect accelerated for more and more creativity and innovations with huge investments in 'Research and Development'. Every innovation involves committed effort and consistent expense. Thus for the fruits of labour men look for the protection of his rights of innovation. The developments in the field of plant breeding are of recent developments which have led to wide spread piracy of genetic resources.

LEGAL PROTECTION OF PLANT VARIETIES:

The lack of an effective protection led to the formation of the International Union for the Protection of New Varieties of Plants (UPOV). The UPOV Convention was first signed in 1961 to provide a form of legal protection of plant varieties which has been revised in 1978 and 1991. UPOV does not recognise the notion of prior knowledge of the farming community and consequently takes no notice of the farmers' right to the benefits flowing out of such knowledge.

RIGHTS REGARDING PROTECTION OF PLANT VARIETIES BETWEEN BREEDERS AND FARMERS:

The knowledge of indigenous peoples and traditional farmers has made a significant contribution in the development of new crop types and biodiversity conservation. Indigenous peoples and traditional farmers have been an important agency in the conservation of plant genetic resources and the transmission of these resources to seed companies, plant breeders and research institutions. They have not typically been paid for the value they have delivered, whereas breeders and seed companies have resorted to intellectual property rights to recover their development expenditures. Thus there is a conflicting of interests regarding protection of plant varieties between the breeders and the farmers.

PROTECTION OF PLANT VARIETIES UNDER TRIPS AGREEMENT:

TRIPs as a part of WTO with effect from January 1, 1995 proclaimed a mandatory call on all the member countries to bring their own national Intellectual Property Rights Laws in conformity with the provisions of TRIPs agreement. Article 27.3(b) of the TRIPs Agreement clearly indicates that members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. India, as a member country, has drafted a *sui generis* system of protection for balancing the conflicting interests of breeders and farmers.

OBLIGATION OF MEMBER COUNTRIES:

TRIPs Agreement obliges member countries to comply with the forms of protection as designated in Article 27.3(b) of the Agreement. The UPOV system is currently considered as the solution for compliance with TRIPs but it provides rights only to plant breeders and not to farmer-breeders.

So in response to the obligation as a member of the TRIPs Agreement, India has adopted a *sui generis* system of protection and enacted the Protection of Plant Varieties and Farmer's Rights Act, 2001 (PPVFR Act) by recognizing there the rights of the breeders as well as the farmers. Similarly India has enacted the Biological Diversity Act, 2002 and the Patents (Amendment) Act, 2002 to fulfill its obligation under the Convention on Biological Diversity, 1992 and TRIPs respectively.

The Biological Diversity Act, 2002 focuses on regulating access to and use of genetic resources in India and establishes a National Biodiversity Authority to determine benefit sharing arising out of the use of biological material. The Authority is required to ensure 'equitable sharing of benefits' on mutually agreed terms between the persons applying for approval, local bodies and those filing claims for benefit sharing.

PROTECTION BREEDERS' RIGHTS AND FARMERS RIGHTS IN INDIA:

The PPVFR Act is the main law in India dealing with Farmers' Rights. It seeks to put farmers' rights at par with breeders' rights. It envisages that farmers should be treated like commercial breeders and should receive the same kind of protection for the varieties they develop. It states that nothing shall affect the right of a farmer to "save, use, sow, resow, exchange, share or sell [their] farm produce

including seed of a variety protected under this Act... provided that the farmer[s] shall not be entitled to sell branded seed of a variety protected under this Act."² As a result, farmers are entitled to sell locally any variety of seed that they grow, even if the variety has been granted a breeders' right.³ The farmers are prohibited, however, from selling seed that is "branded" by being packaged and labeled in a way indicating that the seed is protected under PPVFR.⁴ As a result, farmers are allowed to sell the breeders' seed under another denomination.⁵

The PPVFR Act clearly recognises the rights of the farmers as conservators, breeders and cultivators. The Protection of Plant Varieties and Farmer's Rights (PPVFR) Authority, under the Act, is obliged to register new strains of plant varieties developed by the farmers alongside the professional breeder. The PPVFR Authority is also required to ensure equitable benefit sharing with the farmers.

Farmers are also protected from terminator technology, meaning breeders are forbidden from marketing a variety that prohibits a plant from germinating a second time.⁶ In addition, breeders are required to disclose to farmers the expected performance of the variety under given conditions.⁷ If the propagating material fails to perform as specified under the given conditions, farmers may claim compensation⁸ from the breeders.⁹

Furthermore, when breeders use the farmers' variety to breed a new variety, the breeders must pay a royalty into the National Gene Fund.¹⁰ This concept, called benefit sharing, gives rights and rewards to farmers for contributing to the creation of new varieties of agriculture. Also, farmers are granted an exemption from infringing on any PPVFR right when the farmers at the time of the infringement, did not know of the existence of the right.¹¹ Finally, farmers will receive all the rights and protections of a breeder, if the farmer breeds or develops a new variety.¹²

The PPVFR Act seeks to put farmers' rights on a par with breeders' rights. It provides, for instance, that farmers, like commercial breeders, can apply to have a variety registered. The PPVFR Act envisages that farmers should be treated like commercial breeders and should receive the same kind of protection for the varieties they develop. It also provides two avenues for benefit sharing.¹³ The first scheme allows individuals or organizations to submit claims concerning the contribution they have made to the development of a protected variety. The second benefit-sharing avenue allows an individual or organization to file a claim on behalf of a village or local community.

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The Patent (Amendment) Act, 2002 now specifically rules out the patentability of living things or non-living substances occurring in nature and further rejects the patentability of plants and animals. Recently the issue of granting patents to life forms has also been discussed in India. Even though, there are arguments against patenting life forms particularly in developing world, but the advent of biotechnology has made it necessary that patents of life forms be allowed, because in its absence, commercial firms would not like to invest in biotechnology research. In view of recent biotechnological developments, the discussion has now progressed beyond merely the question of whether living organisms can be patented, and is now concerned with establishing solid criteria for granting patents. The existing patent laws are also being re-interpreted with regard to biological material.

In addition to these laws, NGOs and others have been promoting various drafts of Bills such as the Community Intellectual Rights Act, Convention of Farmers and Breeders (CoFaB) and some experts have been trying to formulate a Traditional Knowledge Bill. While none of these drafts have been introduced in Parliament or any policy making body.

India is the first country that tries to give the concept of Farmers' rights a legal footing in Plant Breeders Rights (PBRs) legislation. Though India's ability to be one of the first countries in the world to forge a national legislation on Farmers' Rights is a significant landmark and Indian case provides important lessons for other countries in establishing Farmers' Rights, and demonstrates the complex and contentious issues that must be tackled to implement Farmers' Rights, defining and implementing Farmers' Rights has not adequately emerged in India even after establishing a law on Farmers' Rights. The protection and realization of such rights are still remained as a challenge for the farmers in India. There are problems of comprehension with regard to the genetically modified seeds, and the natural rights of mankind, the basic human rights of claim over conserved natural resources and more specifically the farmer's rights.

CONCLUSION:

The development of a new plant variety based on genetically modified resources has been frequently a long and costly undertaking. So Intellectual Property Rights provide some assurance to the innovators to recoup costs and profit from the breeding investment. Without this legal protection new plant varieties will be exploited by persons who have not contributed towards the breeding costs. However, the knowledge of indigenous peoples and traditional farmers has made a significant contribution in the development of new crop types and biodiversity conservation. They have not typically been paid for the value they have delivered, whereas breeders and seed companies have resorted to intellectual property rights to recover their developmental expenditures. Further farmers who utilize improved varieties are obliged to pay for them. There would be injustice if the legal protection to new plant varieties will be provided only to breeders without balancing the conflicting interests between breeders and farmers. The legislature has enacted laws to protect the farmers' rights and also new plant varieties so as to promote more and more innovations and breeding. Now efforts are also made to make sure that the farmers who have contributed to the development of a new variety get their fair share. However in reality many farmers are illiterate; they are not aware of their rights and benefits that they can avail and enjoy over their innovations or production, which will provide ample opportunities to the corporate sector to cheat and misuse the rights of the farmers.

A global mechanism is urgently required to promote some level of consensus on defining and implementing Farmers' Rights. If the global community does not face up to the challenge of unambiguously articulating Farmers' Rights, what has been achieved so far in the battle to establish Farmers' Rights may be lost.

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Notes:

- I. Farmers under section 2(k) of the PPVFR Act are those who cultivate crops, or who conserve and preserve or add value to any wild species or traditional variety.
- II. Ibid section 39(1)(iv).
- II. See Response to Gene Campaign's PIL: Government Admits It Will Not Protect Farmers' Rights, Only Breeders Rights; <http://www.genecampaign.org/april.html>.
- IV. PPVFR section 39(1)(iv).
- V. International Union for the Protection of New Varieties of Plants, http://www.upov.int/en/documents/Symposium2003/panel_discussion.pdf.
- VI. The Protection of Plant Varieties and Farmer's Rights Act, 2001, Section 18(1)©.

- VII. Ibid, section 39(2).
- VI. Right to compensation is requested to the Authority. The Authority shall give notice to the breeder of the variety and give the breeder an opportunity to file opposition. After hearing the parties, the Authority "may direct the breeder to pay such compensation as it deems fit."
- IX. Ibid.
- X. The National Gene Fund holds money paid by breeders when using farmers' varieties for producing a new variety. The proceeds of the fund "go toward farmer's welfare-maintenance of community gene banks or compensation for crop failures, etc."
- XI. The Plant Varieties and Farmers' Rights Act, 2001, Section 42(I).
- XII. Ibid, section 39(1)(I).
- XIII. The Protection of Plant Varieties and Farmer's Rights Act, 2001, Sections 26 and 41.
- XIV. The National Biodiversity Act, 2002, Section 21(1).